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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHICAGO CABLE COMMUNICATIONS, SOUTH CHICAGO CABLE, INC., and CABLE OF CHICAGO,

Petitioners,

v.

CHICAGO CABLE COMMISSION and CITY OF CHICAGO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the City of Chicago, without offending the First Amendment to the United States Constitution, may impose fines upon cable franchise operators for failing to honor their franchise commitments to air 4½ hours per week of locally produced, locally focused programming.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the validity of fines levied by a municipality against a cable franchise operator for failing to honor its commitment to air 4½ hours of locally produced, locally focused programming. In 1982 the City of Chicago ("City") adopted the Chicago Cable Commun-

ications Ordinance (Chapter 113.1 of the Municipal Code). The ordinance created the Chicago Cable Commission to regulate the new cable industry. Chapter 113.1 divides the City into five areas and provides for the franchising of cable television systems within those areas. The petitioners here—all affiliates of Telecommunications, Inc. ("T.C.I."), who collectively do business as Chicago Cable TV ("CCTV")—were awarded franchises for three of the five areas. A different company, Group W Cable, was awarded the franchises for the other two areas. *Chicago Cable Communications v. Chicago Cable Commission*, 678 F. Supp. 734, 736 (N.D. Ill. 1988).

As set forth more fully in the district court's opinion below, the franchise agreement entered into by the petitioners required them to produce and air a certain amount of "local origination" ("l.o.") programming each week. In the period at issue in this case, petitioners committed themselves to 9 hours of local origination programming per week on one of their 60 channels. The petitioners and Group W subsequently agreed, with the approval of the City, to divide this responsibility: Group W and CCTV would each produce 4½ hours of l.o. programming, and each would air the other's 4½ hours. *Id.* at 736-37. Group W honored its commitment, but petitioners did not. *Id.* at 748. Instead, they aired programming produced in the suburbs by other TCI affiliates. Some of this programming was of interest to Illinois residents or residents of the Chicago metropolitan area, but the district court agreed with the respondents' conclusion that the petitioners did not show that the programming was geared to their local audience, as required by the agreement. *Id.* at 742.

The Cable Commission, after extensive discussions and correspondence with the petitioners, found that they had

failed to satisfy their "local origination obligations as Grantees for Areas 1, 4 and 5" in that they were airing programming obtained through other TCI affiliates in the surrounding area rather than producing their own programming locally. The Commission also found, based on petitioners' own submissions to it, that "the subjects of the programming are, for the most part, geared to the broad City-suburban Chicagoland areas rather than the communities that CCTV/TCI serves." *Id.* at 742. The Commission imposed fines of $60,750 on the petitioners. *Id.*

The petitioners challenged those fines in the United States District Court for the Northern District of Illinois. In their complaint they made a number of challenges to the fines based, *inter alia*, on due process, equal protection and First Amendment grounds. The district court upheld the fines on all bases. Petitioners then appealed to the United States Court of Appeals for the Seventh Circuit, again pressing due process, equal protection and First Amendment theories. The Seventh Circuit likewise affirmed on all points. 879 F.2d 1540 (7th Cir. 1989).

Before this Court, petitioners raise only one issue: whether the Seventh Circuit erred by applying the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), to resolve the petitioners' First Amendment challenge to the fines.

REASONS FOR DENYING THE WRIT

I.

THE CITY'S IMPOSITION OF FINES ON PETITIONERS FOR FAILING TO PRODUCE PROGRAMMING WITHIN THE CITY DOES NOT IMPLICATE THE FIRST AMENDMENT.

The petitioners were fined for failing to produce their quota of local programming in the City of Chicago. That is a finding they have never contested. And that finding, as the Seventh Circuit held, was "the true basis for the fine." 879 F.2d at 1547.

The Seventh Circuit was quite explicit in its finding that the petitioners' failure to produce the programming locally, as they had promised to do, was the basis for the fines against them:

> The franchise agreement clearly envisioned local production, the notice of violation was based on the same requirement, and the ultimate notice of assessment premised the violation on local production, although "[f]urthermore" criticizing CCTV's suburban-type subject matter. That the lack of Chicago production was the true basis for the fine is manifested as well by the parties' subsequent conduct at the hearing on CCTV's motion to reconsider. After the assessment occurred, CCTV presented a plan to the Commission in which CCTV and Group W would jointly produce their local origination programming at a local Chicago facility, rather than in Mount Prospect, the site of the programming for which CCTV had been fined. Based on this proposal the Commission decided to withhold imposition of further fines until the new programming was produced. No mention was even made as to the suburban content of the programming. This

> further highlights the fact that CCTV was fined for non-compliance with the local production requirement rather than for suburban-oriented content, as shown in the notice of violation.

879 F.2d at 1547.

This basis for the fines does not implicate the First Amendment in any way. Even the petitioners concede as much by failing to argue the point in their "Reasons for Granting the Writ." Indeed the only references they make in the Petition to their failure to produce programming locally are in the "Questions Presented" and "Statement of the Case". The point is not discussed at all among the reasons for granting the writ.

Because the fines were imposed for valid reasons that do not implicate the First Amendment, there is no reason to review the Seventh Circuit's discussion of the standard for evaluating First Amendment challenges to cable regulations, which is merely *dicta*. Accordingly, the writ should be denied.

II.

THE SEVENTH CIRCUIT'S ANALYSIS OF FIRST AMENDMENT CONCERNS IN THIS CABLE REGULATION CASE FOLLOWS THIS COURT'S TEACHINGS AND IS CONSISTENT WITH ANALYSES APPLIED BY OTHER FEDERAL COURTS IN COMPARABLE CASES.

Although it did not need to do so to sustain the district court's decision, the Seventh Circuit nevertheless reviewed and approved the lower court's conclusion that the City was not constrained by the First Amendment from imposing fines on petitioners for failing to produce 4½ hours of programming, geared to their local audience. Both

lower courts used the standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).[1]

The petitioners do not challenge how the Seventh Circuit applied the *O'Brien* criteria to the facts of this case, and so there is no need to repeat that analysis here. Their only quarrel is with the use of that test. Yet the test's application in the cable context is nothing new.

This Court itself cited *O'Brien* in the cable regulation context: "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) (citations omitted). In addition, lower courts have consistently applied *O'Brien* in reviewing a variety of cable regulations. *See e.g. Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (FCC rules requiring cable systems to carry certain local broadcast station signals); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (FCC rules prohibiting cable operators from devoting more than 90 percent of cablecast hours to movie and sports programming and prohibiting advertisements on pay cable channels); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on other grounds*, 476 U.S. 488 (1986) (municipal policy

[1] "[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 496, cited at 879 F.2d at 1548.

limiting each area of the city to a single cable franchisee); *Erie Telecommunications v. City of Erie*, 695 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3rd Cir. 1988) (upheld requirements that cable operators set aside "access channels" for use by the public); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985); *Carlson v. Village of Union City*, 601 F. Supp. 801 (W.D. Mich. 1985) (upheld revocation of a cable operator's franchise). Thus, the Seventh Circuit's use of the *O'Brien* test in this cable case is consistent with how other federal courts are approaching this issue.

In non-cable contexts, where free speech was involved, this Court has also used the *O'Brien* test. For example, in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) this Court held that an ordinance that prohibited the posting of signs on public property did not violate the First Amendment. This Court applied *O'Brien* after concluding that the ordinance was viewpoint neutral. The Court emphasized that the ordinance had been enforced in an even-handed manner and that it was not designed to suppress certain ideas. This Court also noted that the text of the ordinance was neutral toward any speaker's point of view. *Id.* at 804-05. Thus, the Court applied the *O'Brien* framework, even though the sign ban prohibited a certain manner of communication. *Id.* at 803.

Like the ordinance in *Taxpayers for Vincent*, the local origination requirement is viewpoint neutral, as the courts below determined. The Commission did not require CCTV to transmit across its cable system any specific program, kind of show, or editorial viewpoint. 879 F.2d 1540, 1551; 678 F. Supp. 734, 746. Moreover, the l.o. requirement does not "regulate speech in ways that favor some viewpoints

or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804.

The test used in *O'Brien* is, as this Court recently reasserted, not essentially different from the test traditionally used to evaluate restrictions on the time, place or manner of protected expression. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757 (1989). This Court has used that test to judge the constitutionality of regulations, even though the regulations have had some impact on free expression. So long as a regulation is "viewpoint neutral" and designed to serve substantial governmental purposes "not related to the suppression of free expression," some kind of balancing of the governmental interest against the private speech concerns is appropriate. *See Texas v. Johnson*, 109 S. Ct. 2533, 2538 (1989), and *Taxpayers for Vincent*, 466 U.S. at 804.

As this Court has recently explained, a regulation is unrelated to the suppression of free expression and, thus, content neutral, so long as it is "*justified* without reference to the content of the regulated speech." *Ward*, 109 S. Ct. at 2754; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S 41, 48 (1986) (emphasis in original). Such a regulation is deemed content neutral even if it has an incidental effect on some speakers or messages but not others. *Ward*, 109 S. Ct. at 2754.

Using the comparable time, place and manner standard, in *Renton* this Court upheld a zoning ordinance that prohibited adult movie theaters from locating within 1,000 feet of residential and certain other limited types of zones. The Court found that the ordinance was content neutral, since the ordinance, by its terms, was designed to protect the quality of neighborhoods. 475 U.S. at 48. The ordinance was aimed not at the content of the films but rather at the secondary effects of such theaters on the surrounding community. *Id.* at 47.

Likewise, in *Ward* this Court found constitutional a New York City guideline restricting sound amplification at concerts held in a public park. The city justified its guidelines as an effort to control noise levels in the surrounding area and to ensure the quality of sound at the concerts. 109 S. Ct. at 2754. This Court found that these objectives were content neutral. *Id.*

Like the regulations at issue in *Renton* and *Ward*, the local origination requirement at issue here is not related to the content of speech. Instead, as the courts below determined, this requirement serves several substantial purposes. Local origination provides an outlet for community self-expression, creates an opportunity for improved communications between residents of the City, and encourages localism, community pride, and cultural diversity. 879 F.2d at 1549-50; 678 F. Supp. at 745. These goals have nothing to do with the content of the programming, which the cable operator remains free to select.

In addition, the regulation at issue here is a very modest one, as the Seventh Circuit noted. 879 F.2d at 1550-51. Contrary to the petitioners' assertions, it does not divest them of editorial control or "artistic judgments" (Petition at 23): they remain free to select the programming they air. Like the FCC's local origination regulation at issue in *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the regulation here permits the cable operator to retain ultimate control over program selection. The requirement that 4½ hours of that programming, out of the hundreds of hours the petitioners offer on 60 different channels each week, be "geared to" their audience is neither onerous nor offensive. Because their audience is a diverse urban population with innumerable interests, the petitioners' programming options are likewise innumerable. While the regulation, because it touches on First

Amendment concerns, must be narrowly drawn, it need not be the least intrusive means of achieving the government's purpose. *See Ward v. Rock Agains Racism*, 109 S. Ct. at 2757-58; *United States v. Albertini*, 472 U.S. 675, 689 (1985). It is sufficient to show that the intrusion is incidental, as this small requirement surely is.

Thus, the analysis used by the courts below was an appropriate one. Whether formally analyzed under the rubric of *O'Brien*, or the similar time, place and manner test, the ordinance is properly evaluated by looking at the governmental interest at stake to determine how substantial it is, whether the regulation furthers that interest, whether that interest is unrelated to the suppression of free expression and whether the regulation is narrowly tailored to meet the desired ends.

The regulation at issue here does indeed further substantial govenmental interests with only minimal impact on First Amendment concerns, as the courts below held. This Court should therefore decline to review this case.

CONCLUSION

The decision below does not raise First Amendment concerns. Moreover, the Seventh Circuit's analysis of the City's local origination requirement was entirely appropriate and consistent with the reasoning of this Court and the decisions of other federal courts. Accordingly, review should not be granted.

Respectfully submitted,

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